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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 251

PETER H. MILLER, Individually and as Collector of Internal Revenue for the District of Florida,

Petitioner,

v.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR THE RESPONDENT

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REPLY BRIEF FOR THE RESPONDENT

I.—OPINIONS BELOW

The opinion of the District Court has not been officially reported, but the views of that Court, after hearing the evidence, are set out in the Record at page 43 to 45, and at page 69 of the Record the Court said:

> "I think the essential averments of this bill have been shown here. Let a decree be entered in accordance with the prayer of the bill."

The opinion of the Circuit Court of Appeals for the Fifth Circuit fully reviewed the extraordinary and exceptional circumstances which it held justified the granting of the injunction, and is set out on pages 75 to 83 of the Record and is reported in 49 Fed. (2d), 79.

II.—QUESTIONS PRESENTED

Respondent does not concede that the questions presented is as stated by the petitioner. The questions presented in the petitioner's brief differs from the questions as presented in the petition for certiorari. The questions as viewed by respondent are:

(1) Whether or not the circumstances, as alleged and proven, present such extraordinary and exceptional circumstances as to constitute an exception to Section 3224 R. S.; and

(2) Is the Commissioner of Internal Revenue acting under the color of his office and immune from injunction when he persists in attempting to assess and coerce the payment of money under the guise of a tax after it has been judicially decided by District Courts of the United States on hearings on the facts that the products in question are not taxable?

III.—STATEMENT

Respondent disagrees with the statement of facts as set out on page two of petitioner's brief. That statement would tend to cause this court to believe that the case involved only an amount of $5,000.00, which was the estimated tax demanded for the month of January, 1929; while the record shows (p. 9, 10) that the case really involves a tax of 10 cents per pound upon all of the product "manufactured and sold from the time business was commenced", which was for a period of more than two years, as well as involving a tax upon all of respondent's wholesale and retail dealers; and that, as the tax claimed was 10 cents per pound, and the profit 3 cents per pound, it would be absolutely impossible to pay it and sue to recover it back.

The fact is, as alleged in the bill of complaint below, that an enormous sum amounting to ten cents per pound upon its production for a period of those two years is involved, as well as the complete destruction of the trade built up by respondent with its dealers, on the faith of a permit from the Commissioner of Internal Revenue to operate tax free.

The statement of facts as reviewed in the opinion of the Circuit Court of Appeals (R 80-88) is very clear and concise and the facts as there stated briefly are:

The product upon which the petitioner attempted to levy, known as Southern Nut Product, was a mixture of cocoanut oil, peanut oil, salt, water and coloring matter. It contained no ingredients deleterious to health, was packed only in one pound cartons plainly labelled, and showing its ingredients. It was the same as a product which was manufactured by a firm of Providence, Rhode Island, the Higgins Mfg. Co., known as Nut-Z-All, which, prior to respondent's entering into the manufacture of the product, had been held by Judge Brown in the District Court of Rhode Island (Higgins v. Page, 297 F. 644), not to be oleomargarine or taxable as such. The government took no appeal from that decision. The Commissioner of Internal Revenue published this decision in the form of a Treasury Decision informing all concerned that that product had been held not to be taxable. The Commissioner had informed an association of oleomargarine manufacturers, known as the Institute of Margarine Manufacturers, that the court had held the product not taxable and that the manufacturers or dealers were not subject to tax as on oleomargarine. The Commissioner again attempted to tax these products by Treasury Decision No. 4006. Judge Lowell, of the District Court of Rhode Island, (R-4-6), and Justices Bailey and Hoehling of the Supreme Court of the District of Columbia, had granted injunctions against the enforcement of the said Treasury Decision on the ground that the facts at that time constituted exceptional and extraordinary circumstances making Sec. 3224 R. S. inapplicable (R-7). No appeals were taken from these decisions. Respondent then inquired of the Commissioner as to the taxability of a similar product, Southern Nut Product, which it contemplated manufacturing and selling, and was informed that it had the same right to manufacture such a product without taxpaying it as oleomargarine as was being enjoyed by those firms which had obtained favorable court decisions. (R 8) Petitioner began manufacturing the pro-

duct which brought a profit of 3 cents per pound, and at the time of the filing of this suit had so continued for two years. The respondent's product was before Judge Barrett of the United States District Court of the Southern District of Georgia (Baltimore Butterine Co. vs. Talmadge, 32 Fed. (2) 904), (R 8), who decided it was not an imitation of butter, which decision was affirmed by the Circuit Court of Appeals of the 5th Circuit. (37 Fed. (2) 1014). All these facts were set out in the bill, and were proved on the hearing of the case. The trial court held that the material allegations of the bill had been established, and the Circuit Court of Appeals held that this conclusion was consistent with the Record. (Op. of Court R 83, 49 Fed. (2) p. 82). The petitioner offered no evidence. After these cited court decisions, a bill was introduced in Congress to include such products as Southern Nut Product within the definition of oleomargarine. This bill became law July 10, 1930, but was not effective until July 10, 1931. While such bill was being considered, the Committee on Agriculture of the House of Representatives reported that the purpose of the contemplated law was to tax a new class of products, such as Southern Nut Product, stating such products were not within the definition of oleomargarine under the then existing law. Congress believed the products were not taxable. The Commissioner of Internal Revenue did not believe such products taxable, and so wrote Congress recommending the passage of the bill. (Opinion R. 79).

In the face of all of the above facts, petitioner attempted to tax Southern Nut Product, and assessed an estimated tax of $5000.00 for the month of January 1929. He also demanded to know the amount of the product which had been manufactured for two years past, for which he stated, "an additional assessment will be made." (R. 9). All this is set out in the opinion below, (49 F. (2) 83). (R. 80-87).

IV.—SPECIFICATION OF ERROR URGED BY PETITIONER

Since petitioner has not in his brief assigned specification of error No. 2 as set forth in the petition, it is taken for granted that said specification is abandoned. The petitioner assigns in his brief, as the sole specification of error, that Section 3224 prohibits an injunction in a case of this kind.

V.—SUMMARY OF ARGUMENT

1. The facts in this case make it an exception to Section 3224 R. S.

2. Summary of exceptional circumstances making this case an exception to 3224 R. S.:

   (1) Identical with Nut-Z-All.

   (2) Permit to Higgins Manufacturing Company to manufacture Nut-Z-All tax free.

   (3) Attempt to revoke permit.

   (4) and (5) Higgins recovers tax at law.

   (6) This decision published as T. D. 3590.

   (7) Letter to oleo manufacturers product not taxable.

   (8) T. D. 4006 attempted to tax enjoined.

   (9) Baltimore Butterine Company obtains injunction.

   (10) Commissioner's permit to respondent to manufacture tax free.

   (11) Judge Barrett's decision this product not in imitation of butter.

   (12) Estimated assessment and levy of $5000 for one month and similar demand for 24 additional months.

   (13) and (14). Size of tax and amount demanded made payment impossible.

(15) Higgins Co. still allowed to sell tax free.

(16) Commissioner advised Congress product not taxable and requests law to make it taxable.

3. The case of Hill v. Wallace and the facts there held to constitute exceptional and extraordinary circumstances
Analysis of exceptional and extraordinary circumstances in Hill v. Wallace:

(1) Heavy criminal penalties

(2) Legal remedy would destroy business

(3) Multiplicity of suits

(4) Tax most burdensome

4. Circumstances of Hill v. Wallace compared to those in case at bar.

(1) Civil and criminal penalties under the oleo law and cases cited.

(2) Destruction of plaintiff's business built under permit from Commissioner entitled to relief in advance of injury.

(3) Multiplicity of suits

(4) Most burdensome tax because amount incurred under permit too large to be paid.

Conclusion of law and fact made by Circuit Court of Appeals.

5. The claim of "color of office."
Claim that Section 14 of oleo act justified the findings of Commissioner in the face of court decrees etc.
CCA ruling on Section 14 of oleo act.
Justice Adkins construction of Section 14 of oleo act.
Judge Brown's ruling on justification under Section 14 after court decrees contra.

Justice Bailey's ruling tax cannot be levied after courts have held same invalid.

6. Respondent's product was not oleomargarine

(a) It was not made in imitation or semblance of butter.

(b) It did not contain the enumerated statutory ingredients.

(1) Vegetable fats not included under law.

(a) Respondent's product contains no animal fat.

(b) Oleo law only names animal fats and coloring matter.

(c) Statute covered only products heretofore known as oleo.

(d) Attempted insertion of comma by department to make vegetable oils taxable.

(e) Solicitor General's statement as to vegetable-oil.

(f) Judge Brown doubted that animal fats were intended to be included.

(g) Statute cannot be changed by department by addition of comma to make product taxable.

(h) Taxation laws construed in favor of taxpayer and all doubts resolved against the tax.

(i) Conditions at time law was passed—these products were unknown.

(2) Treasury Department and Congress both admit the law did not tax this product.

(a) The new law effective July 10, 1931.

(b) The author, Mr. Haugen represented to Congress that law did not tax these products.

(c) Similar report to Congress by Commissioner of Agriculture.

(d) Similar remarks by Mr. Purnell, sponsor of the 1930 law.

(e) Senator Norbeck stated to Congress that these products escaped the former law.

(f) Commissioner himself recognized products not taxable and so wrote Congress in advocating new law to tax them.

(g) Senator McNary's statement new law designed to tax products not then taxable.

The opinions of legislative bodies are persuasive on the courts in construing statutes.

(a) The practical construction placed by Congress on statute in cases of doubt is controlling.

Circuit Court of Appeals judgment that vegetable products not taxable and therefore 3224 does not apply inasmuch as there was no law purporting to tax such a product.

VI.—ARGUMENT

1. The Facts in This Case Make it an Exception to Sec. 3224 R. S.

This case involves solely the question of law as to whether the facts as found by the District Court, and elaborated upon by the Circuit Court of Appeals, show such exceptional and extraordinary circumstances as to create an exception to Sec. 3224 R. S. Aside from this, the facts are not in issue.

The bill made certain allegations of fact as a basis of the plaintiff's right to an injunction. The answer and amended answer admitted some of these and denied others. The plaintiff offered in evidence testimony, documentary evidence, and physical exhibits; and as a result, the trial judge, who heard

this testimony, and saw the records and the physical exhibits, found that the plaintiff had established the material allegations of the bill. The defendant placed no witness on the stand, nor offered any evidence of any kind. He based his defense solely upon the claim of lack of jurisdiction because of the bar of Section 3224 R. S.

The appellate court, in its opinion, fully reviewed these facts as shown by the record below, as found by the court below, and by other courts dealing with the same subject matter. These facts are before this court now only for the purpose of determining the question of law as to whether, because of the conditions which they show, the court was correct in holding that they constituted such extraordinary and exceptional circumstances as to justify the injunction granted.

The specification of error that the court erred in granting the injunction because of R. S. 3224, depends entirely upon whether the facts as set out in the allegations of the bill, and proven by respondent at trial, create an exception to Sec. 3224 R. S.

2. Summary of Exceptional Circumstances Making This Case an Exception to Section 3224 R. S.

In order that this court may know what the existing circumstances were, they are here set out as shown by the record. They were:

1. The product which petitioner attempted to tax (Southern Nut Product) was identical to a product (Nut-Z-All) manufactured and sold by the Higgins Mfg. Co. of Rhode Island.

(2) The Higgins Manufacturing Co. had in January 1922 received a permit from the Commissioner of Internal Revenue to manufacture and sell Nut-Z-All without tax paying it as oleomargarine (297 Fed. 645).

(3) In Dec. 1922 the Commissioner revoked this permit and held the product taxable. (297 Fed. 646).

(4) The Higgins Mfg. Co. paid a tax on the product and sued the collector to recover it back.

(5) After a lengthy trial upon the facts Judge Brown held the product not to be oleomargarine and not taxable as such. (297 Fed. 651.) (R. 2.)

(6) The Commissioner published the decision as a Treasury Decision (T. D. 3590) (R. 2) for the information of all concerned.

(7) The Commissioner by letter advised an association of oleomargarine manufacturers that such products were not taxable as oleomargarine (R. 3) and that their manufacture and sale would not render either the manufacturer or dealer liable to a tax.

(8) In July 1927 the Commissioner again sought to tax as oleomargarine the product of the Higgins Mfg. Co. by virtue of a treasury decision (T. D. 4006) and was restrained by Judge Lowell as being in defiance of the decision of the court and constituted an extraordinary and exceptional situation which justified injunctive relief. (20 Fed. (2) 948) R. 6) The decision was not appealed by the government.

(9) In July 1927 the Commissioner under the authority of said Treasury Decision sought to tax as oleomargarine a product of the Baltimore Butterine Co. known as Nuine, identical to respondent's product, but was enjoined from doing so by Justices Bailey and Hoehling of the Supreme Court of the District of Columbia (R. 6) on the ground that such an attempt constituted exceptional and extraordinary circumstances justifying injunctive relief.

(10) Respondent then sought a ruling by the Commissioner's office as to the taxability of its product, Southern Nut Product, and was advised it had the same privilege to manu-

facture the product without taxpaying it as oleomargarine as was being enjoyed by those manufacturers who had received favorable court decisions. (R. 8)

(11) In May 1929 respondent's product was before Judge Barrett of the District Court of Georgia on a charge that it was adulterated and misbranded under the terms of the Food and Drugs law of that state in that it imitated creamery butter, one of the questions at issue being the allegation by the State of Georgia that the product was oleomargarine. After a lengthy hearing the court decided that the product was not an imitation of butter or of anything else. This decision was affirmed by the Circuit Court of Appeals for the 5th Circuit. (R. 8, 9)

(12) The Commissioner then placed an assessment upon respondent's product which he estimated had been produced in January, 1929 in the sum of $5,000.00, and ordered petitioner to ascertain the amount manufactured from the time business was commenced upon the full amount of which an assessment would be made. (R. 9)

(13) No analysis or inspection of respondent's product had ever been made, as required by Section 14 of the oleomargarine law.

(14) That the tax was approximately three times the profit on the goods and the payment of the demand and suit for recovery was an impossibility and would render respondent insolvent. (R. 10)

(15) No effort was being made to tax the product of the Higgins Manufacturing Company in Florida, which was being sold tax free at the time of trial, (R. 53) in respondents immediate territory.

(16) The Commissioner did not believe such products taxable and requested Congress to pass a law which would

make them taxable. (R. 78, 79). Such a law was passed June 10, 1930, effective July 10, 1931. (Petitioner's brief, pp. 31, 32).

3. The Case of Hill vs. Wallace, and the facts there existing held to constitute exceptional and extraordinary circumstances.

Do all of these facts constitute such extraordinary and exceptional circumstances as to justify an injunction notwithstanding Section 3224 R. S.? We have no definition of what constitutes exceptional and extraordinary circumstances, but this court, in Hill vs. Wallace 259 U. S. 44, enumerated certain things which make the provisions of Section 3224 inapplicable. That case was a bill in equity to restrain the Collector of Internal Revenue from levying a tax of 20c per bushel on all sales of grain for future delivery. Because of its importance it is hereby fully quoted for the convenience of this court:

> "A further question arises as to whether this is a suit for an injunction against the collection of the tax, in violation of S. 3224, Rev. Stat. Comp. Stat. S. 5947, Fed. Stat. Anno. 2d ed. p. 1032, in so far as it seeks relief against the district attorney and collector of internal revenue. Were this a state act, injunction would certainly issue against such officers, under the decisions in Ex Parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 29 Sup. Ct. Rep. 441; 14 Ann. Cas. 764; Ohio Tax Cases, 232 U. S. 576, 587, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372; McFarland v. American Sugar Ref. Co. 241 U. S. 79, 82, 60 L. ed. 899, 902, 36 Sup. Ct. Rep. 498. Does S. 3224, Rev. Stat. prevent the application of similar principles to a Federal taxing act? It has been held by this court, in Dodge v. Brady, 240 U. S. 122, 126, 60 L. ed. 560, 562, 36 Sup. Ct. Rep. 277, that S. 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also Dodge v. Osborn, 240 U. S. 118, 122, 60 L. ed. 557, 560, 36 Sup. Ct. Rep. 275. In the case before us, a sale of grain for future delivery without pay-

ing the tax will subject one to **heavy criminal penalties.** To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back, would **necessitate a multiplicity of suits,** and indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market, in order to test the validity of the act, **would stop its 1600 members in a branch of their business most important to themselves and to the country.** We think these exceptional and extraordinary circumstances with respect to the operation of this act make S. 3224 inapplicable." (Blackface type ours).

An analysis of the above decision shows that the conditions which this court considered extraordinary and exceptional are:

(1) Heavy criminal penalties.

(2) The legal remedy to test the validity of the law, "would stop 1600 members" (of the Board of Trade) in that business.

(3) A multiplicity of suits.

(4) A tax of 20c per bushel on grain sold would be **most burdensome.**

4. Circumstances in Hill vs. Wallace compared to those in case at bar.

Applying the test for extraordinary and exceptional circumstances as set out in Hill vs. Wallace to this case, we find:

(1) HEAVY CRIMINAL PENALTES.

(a) The penalties involved in a violation of this law are so heavy and severe that no one would dare to risk a violation of the law to test its application. A violation would subject the manufacturer to fines from $1000 to $5000, the wholesaler who handled it to a tax of $480.00 with penalties and fines

from $500.00 to $2,000.00, and the retailer who handled it to a tax of $48.00 with penalties and fines from $50.00 to $500.00. The law bristles with the severest of punishments for the slightest variation from the prescribed conduct of the business, even to the extent of forfeiture of factory and materials, besides imprisonment up to two years. Section 11 of the act goes so far as to make the purchasing public liable to a penalty of $50.00 for each purchase of oleomargarine not properly branded and stamped.

That injunction is the proper remedy under such circumstances is shown by the case of Santa Fe Railroad Co. v. Lane, 244 U. S. 492, 497, 61 L. Ed. 1275, 1280 which involved the right to enjoin an unauthorized act of an executive official done under color of his office. This court said:

> "Thus the demand was an unauthorized act, done under color of office, and the defendant properly may be enjoined from insisting upon or giving effect to it. The plaintiff was not required in order to test the validity of the demand to permit the 90 days to pass and rely entirely upon such suit as might be brought by the attorney general. On the contrary, if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity to have the defendant enjoined from insisting upon or giving effect to it. The hazards and embarrassments incident to any other course were such as to entitle it to act promptly and affirmatively and of course, there was no remedy at law that would be as plain, adequate and complete as a suit such as this against the defendant."

Again in Ex Party Young, 209 U. S. 123, 163, 52 L. Ed. 730, involving the right to enjoin criminal proceedings the Court said:

> "It has been suggested that the proper way to test the constitutionality of the act is to disobey it at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not

avail himself of the opportunity to make the test as obedience to the law was thereafter continued. He might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination that the law was invalid, the property of the company would have been taken during that time without due process of law and there would be no possibility of its recovery."

In the [redacted] Detroit Creamery Co. v. Kinnane, 254 Fed. 845 cited above, [redacted] sought to restrain the enforcement of an alleged unconstitutional criminal statute. The Court there said:

"Plaintiffs, however, are not required to wait until criminal prosecutions are actually brought against them before invoking the equitable relief to which they are entitled under the circumstances. Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. ed. 892."

(2) DESTRUCTION OF BUSINESS.

Another of the exceptional circumstances constituting an exception to Section 3224 as set out in Hill v. Wallace, was that to test out the act would "stop the business of 1600 members," "in a branch of their business most important to them."

In this case, unless restrained by the Court the tax levy would have not only stopped the business of appellee in this case; but it would also have stopped the business of all its wholesalers and its hundreds of retailers, and the business once destroyed could not have been resumed or its destruction compensated for, the damage irremediable and the amount unascertainable.

"It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subjected to vexatious litigation, if he were compelled to resort to his legal remedy alone."

In the case cited by Judge Lowell in Higgins v. Page, 20 Fed. (2d) 948, Acklin v. People's Savings Assn., 293 Fed. (D. C. Ohio) at 394 the Court said:

> "While it is a settled practice, by decision of the Supreme Court in the Dupont and other cases, that the remedy of a taxpayer is in the Bureau of Internal Revenue under Section 3224 et seq., Revised Statutes, and that ordinarily he may not enjoin the collection of a tax, but must pay the tax and seek a refund in the department, nevertheless the existence of exceptional cases is recognized. Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. ed. 557; Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. ed. 822. It is easily conceivable that there are and must be cases in which the rights and property of a taxpayer will be utterly destroyed, if he is compelled to pay an alleged tax and pursue his remedy in the department, wherefore, when the facts clearly show that the pursuit of the ordinary statutory remedy will inevitably result in such destruction, a court of equity may take juridistion to grant relief and to furnish an adequate remedy."

That was a suit by a stockholder to restain the association from paying a tax alleged to have been illegally demanded.

The fact that one becomes liable to the severest punishment for violation of the Oleomargarine Act, and that there is no way of testing this liability short of violation, is sufficient in itself to justify the injunction.

In the recent case of Federal Trade Commission v. Miller's Nat. Federation, 23 Fed. (2d) at 968, 972, the court of appeals for the District of Columbia said:

> "In Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 68 L. ed. 255, jurisdiction in equity to determine the validity of the Anti-Alien Law of the State of Washington (Laws 1921, p. 156), where the fines and imprisonment threatened were less than those imposed by Section 10,

the court said: 'They are not obliged to take the risk of prosecution, fines, and imprisonment, and loss of property, in order to secure an adjudication of their rights.' It thus appears that it is not necessary, as suggested by counsel for the Commission, that the possible fines and penalties be so enormous as 'to stagger the imagination' before a court of equity will intervene. The gravity of the penalty is not controlling, since the mere risk of imprisonment is sufficient to deter the average person into submission to the restrictions of a statute, thus depriving the person, company, or corporation affected of any remedy to test is validity. This rule as to equity jurisdiction is upheld in a number of recent cases by the Supreme Court. Truax c. Raich, 239 U. S. 33, 37, 39, 36 S. Ct. 7, 60 L. ed. 131; Oklahoma Operating Co. v. Love, 252 U. S. 331, 336-338, 40 S. Ct. 338, 64 L. ed. 695; Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735, 23 A. L. R. 229."

The general principle is most concisely set out in Dows v Chicago, 11 Wall. 108, as follows:

"A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. There must exist in addition special circumstances bringing the case under some recognized head of equity jurisdiction, such as the enforcement of tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate throw a cloud upon the title of complainant.

"It is well settled that the remedy at law to oust the jurisdiction in equity must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

Lancaster v. Police Jury, 254 Fed. 179 (D. C. La.)

Tyler v. Savage, 143 U. S. 95, 36 L. ed. 82.

We should not be required to sit idly by and watch our business disappear, and then when it is gone, try in law to

prove that it should not have been killed. This is not the law. The law is that **appellee is entitled to relief in advance of the injury.**

It is further represented to this Court that in undertaking to tax these products petitioner is defiantly proceeding in the face of the very court decisions upon which he based his approval of the manufacture by appellee. He is doing exactly what was so severly criticised by Justice Bailey of the Supreme Court of the District of Columbia, when he said:

> "There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid, and the injury would be irreparable and the amount unascertainable."

See (R. page 6) Baltimore Butterine Co. vs. Mellon, unreported.

That decision restrained the Treasury Department from taxing a product indentical to Southern Nut Product, and involved the same question as is at issue in this case.

(3) THE INJUNCTION PRAYED FOR WILL PREVENT A MULTIPLICITY OF SUITS.

Respondents customers were, if the relief prayed for were not granted, subject to an exorbitant tax and penalty under the law as dealers. Southern Nut Product was only one of hundreds of articles dealt in by them. To protect themselves, it would have been necessary for each customer to have payed this tax and sued to recover.

(4) THE PROPOSED TAX IS MOST BURDENSOME.

The proposed tax in Hill vs. Wallace was 20c per bushel or, as the court said, one-fifth of the value. In this case the manufacturers's tax of 10c per pound is at least 50 per cent of the value of the goods sold, and over three times the profit as alleged in the bill. Thus every time Respondent sold a pound

of Southern Nut Product, it incurred a net loss of 7c. This would appear to be "most burdensome." The tax upon the retailer is $48.00 per year, or almost $1.00 per week, and upon the wholesaler $480.00 per year, or almost $10.00 per week. It is difficult to conceive of a more "burdensome" or destructive levy. This is especially true when the fact that respondent's competitor, the Higgins Mfg. Company, protected by injunction was selling its identical product in respondent's territory, tax free.

In addition to all of these circumstances we have the additional one that the respondent had no adequate remedy at law. The tax demanded was not one that had been added to the cost of the goods and collected by respondent and its amount was several times the net worth of the corporation.

The foregoing discussion and citations, with respect to Section 3224, are of value in this case as showing that under certain circumstances, a tax may be enjoined. Respondent could not pay and sue to recover. The amount is so great that it cannot be paid. Unless the relief prayed for was granted, its business was destroyed. This business, built up by the expediture of time and money, was property or a property right. The action of appellant was illegal, arbitrary and unreasonable, and an open defiance of the decisions of the United States Courts. Appellee was suffering irremediable and irreparable injury and had no remedy (adequate or otherwise) at law, and was in a position where, in equity, it was entitled to relief by the Court, in that the decisions of other courts might not be disregarded. Recent statutes have created exceptions to Section 3224, and in respect to income and estate taxes have relieved taxpayers of the burden of payment and suit to recover (Sec. 274 D. Rev. Act 1924). Courts are no longer leaving taxpayers to the mercy of arbitrary departmental decrees in tax measures, but are protecting taxpayers by injunction; and particularly where rights have accrued on the faith of departmental rulings sought to be reversed.

In Long v. Rasmussen, 281 Fed. 236 (D. C. Mont.), the Collector sought to distrain on property of the plaintiff for the taxes of another. The court in granting the injunction, said:

> "The suit is not against the United States but against an individual who as an officer of the United States in discharge of a discretionless ministerial duty, upon plaintiff's property is committing without authority, contrary to his duty and in violation of the due process of the Constitution and the Revenue laws of the United States positive acts of trespass for which he is personally liable.
>
> "Section 3224 R. S. that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court applies to taxpayers only, and who, thus deprived of one remedy are given by another section, 3226 R. S. an action to recover after taxes paid and repayment denied by the Commissioner, nor are they limited to this statutory remedy, but, after taxes paid may have trespass or other action against the Collector.
>
> "The Revenue laws are a code or system in regulation of tax assessment and collection. They relate to taxpayers, and not to non-taxpayers. The latter are without their scope. No procedure is prescribed for non-taxpayers and no attempt is made to annul any of their rights and remedies in due course of law. The instant suit is not to restrain assessment or collection of taxes of Wise, but is to enjoin trespass upon property of plaintiff, and against whom no assessment has been made, and of whom no collection is sought."

Cited and approved in Trinacia Real Estate Co. v. Clark, 34 Fed. (2) 325 (D. C. N. Y.) where assessment of tax against transferee of property was restrained, the Court saying (327):

> "Section 3224 R. S. however does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable."

Dodge v. Brady, 240 U. S. 122; Hill v. Wallace, 259 U. S. 44.

Section 3224 must be taken and considered not as an independent and isolated section, but in connection with the other sections of the law where it is found. Section 3226 was not available to Respondent, hence it should not have been bound by Section 3224.

When special and extraordinary circumstances of hardships are shown the courts are free to disregard the provisions of R. S. 3224 and prevent by injunctions the collection of a tax. After due consideration of the foregoing facts and law the Circuit Court of Appeals came to the following conclusion:

> "The claim of the defendant that he was legally authorized to coerce the payment of the so-called tax, when that claim was attempted to be sustained in the trial which resulted in the decree appealed from, was made in such circumstances as to be merely colorable, in effect a frivolous pretense that his action in that regard was in compliance with an official duty imposed by law, that claim then being made after it had been judicially determined several times, in suits to which defendant's official superior or the latter's subordinate was a party, that the statute relied on imposed no tax on products of identically the same kind as plaintiff's Southern Nut Product; **after the defendant had influenced the plaintiff to engage in the manufacture of that product by informing him that it was not taxable under the oleomargarine act.**" (Bold face type ours)

> "We think it would be a manifest perversion of the statute in question to permit it to be made the means of enabling a tax official to obtain exemption from being restrained from enforcing an exaction **which no legislation purports to provide for, and which, in suits to which that official or his official superior was a party, have been judicially determined not to be authorized by law.** (Bold face type ours). We conclude that the court, in awarding the injunction complained of, did not, within the meaning of the statute now under consideration, restrain the assessment or collection of any tax." (R. pp. 82 and 83)

5. An act done by an official under color of his office cannot prevail as against adverse court decisions on the same subject.

Petitioner seeks to justify the acts of the Commissioner of Internal Revenue in this case on the ground that what was done was properly done "under color of his office", and that not matter how arbitrary, capricious or contemptuous those acts were they could not be enjoined as long as the Commissioner, "under color of his office" decided that a tax was due.

He refers to the power given the Commissioner by Sec. 14 of the Oleomargarine Law to determine what substances and compounds are taxable as oleomargarine. Section 14 is as follows:

> "Sec. 14 (Act Aug. 2, 1886). That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require; employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this Act; and his decision in matters of taxation under this Act shall be final."

In respect to the contention of petitioner attention is directed to the decision below (R. 80) where the Court in discussing that claim of petitioner said:

> "The so-called finding, evidenced by the above mentioned letter of the Deputy Commissioner of Internal Revenue, to the effect that plaintiff's product, Southern Nut Product, is colored oleomargarine, and taxable as such, was made when there was before the official who

made that finding **no contested case involving the question whether that product was or was not taxable under the law then in force.** (Bold face type ours.) The way in which that action appears to have been taken persuasively indicates that it was based on an exparte investigation, without any hearing of which plaintiff was notified, without plaintiff being given an opportunity to present evidence, and without the introduction or consideration of any evidence having a tendency to prove that plaintiff's product is such a one as was covered by the statute then in force."

The same point is well illustrated by the language of Justice Adkins of the Supreme Court of the District of Columbia in the case of Higgins Mfg. Co. v. Burnet (p. 46 Pet. Brief), as follows:

"I am unable to adopt the contention of counsel for the defendants that under section 14 of the Act of 1886, as amended, the act of the Commissioner of Internal Revenue is final on the courts in this particular case. That section authorizes the Commissioner 'to decide what substances, extracts, mixtures or compounds which may be submitted for his inspection in contested cases are to be taxed under this Act'; and upon this 'his decision in matters of taxation under this Act, shall be final'.

The evidence here shows that the action of the Commissioner was not in what may properly be termed a 'contested' case. The action of the Commissioner was based upon an ex parte investigation conducted by the agents and chemists of the Bureau of Internal Revenue. There was no hearing; plaintiff was not notified of the investigation, and was given no opportunity to present evidence.

In view of the decisions in favor of plaintiff in Higgins Mfg. Co. v. Page, 297 F. 645, and Higgins Mfg. Co. v. Page 20 F. (2) 948, I cannot believe that any subsequent decision of the Commissioner of Internal Revenue is conclusive upon this Court in the present proceeding."

The contention of petitioner that the wording of said Sec. 14 makes any decision that the Commissioner chooses to make with respect to the taxability of oleomargarine final cannot be sustained. As Judge Brown said in the Higgins case, supra,

> "If it be true, as contended by defendant, that a tax may be collected, although it has been judicially determined to be illegal, the result will be that the taxing authorities are entirely above and beyond the law."

Or, expressed by Mr. Justice Bailey in Baltimore Butterine Co. vs. Mellon, (R. 7):

> "There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid."

It must, therefore, be here determined whether or not the theory that the determination of a Commissioner of Internal Revenue is **prima facie** correct; and that he is protected by the claim of "color of his office" against an injunction, is to be sustained when the courts have held prior to such determination that no tax was due, and where the courts have decided that the things done "under color of his office" were illegally done.

6. Respondent's Product was not Oleomargarine.

(a) It was not made in imitation or semblance of butter.

The decision of the question as to whether mixtures and compounds of vegetable oils constitute oleomargarine under the law is not essential to the determination of this case, since the primary tests are whether the ingredients, whatever they are, are made in imitation or semblance of butter, and this question was decided in the negative with respect to Southern Nut Product by Judge Barrett (Baltimore Butterine Co. v. Talmadge, 32 Fed. (2) 904 (R. 8) and with respect to the identical product of the Higgins Mfg. Co. (Higgins Mfg. Co. v. Page, 297 Fed. 644) while the lower court in this case found

that the Higgins product and Respondent's product were identical. (R. 45, 69). Since they were identical, Respondent was entitled to the same protection by a court in Florida as had been extended to the Higgins Co. by a court in Rhode Island and the District of Columbia.

(b) It did not contain the specified statutory ingredients.

(1) Vegetable Fats Are Not Included Under the Law

It is the contention of Respondent that regardless of the action of the Commissioner, its product could not be taxed under the present law, or regulations because its product was composed only of cocoanut and peanut oils which are not ingredients named in the law.

We disagree with the statement of petitioner (Brief, 11) that the record is, "not in proper condition to permit of a final decision of the taxability of respondent's product," for the reason that the question of fact as to imitation and semblance has been decided and the evidence presented proved an absolute absence of statutory ingredients.

Section 2 of the Act defines oleomargarine. It provides:

> "Sec. 2 Act of August 2, 1886 (24 Stat. 209) as amended by Acts of May 9, 1902.—That for the purposes of this act certain manufactured substances, certain extracts and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine', namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard-oil, vegetable-oil annatto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

This is the wording of the original law as filed in the archives of the Secretary of State, as printed in the Statutes at large, and every revision of the law.

It will be readily seen that it names certain substances, i. e. substances **heretofore** known, as, oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral. These are all animal fats, or more strictly speaking, fats of hogs or cattle. The next clause covers all mixtures and compounds of these same substances, naming them. It then names extracts of lard and tallow. Next, mixtures and compounds of certain animal fats specifically named, i. e. tallow, beef fat, suet, lard, lard-oil, intestinal fat, and offal fat, all of which are animal ingredients, and then names "vegetable-oil annotto, and other coloring matter," which is the artificial coloration against which the law is directed. Appellant would attempt to have this court sanction its right to insert a comma in the law which is not in the law and thereby make taxable a vast number of products, the principal ingredient of which, coconut oil, was unknown as a food until thirty years after the passage of the law. It is very evident from an examination of the debates in Congress when the original law was being considered that cottonseed oil was used in 1886 as a softener for the animal fats named in the law, that sesame oil was used to give the product a gloss and that peanut oil was known as having been used and it may be presumed that if the lawmakers had intended their presence in a product to make it taxable they would have named them with the same particularity that they did the animal ingredients.

When the law was first enforced and before science had so far developed the processes of refining vegetable oils so that they might be used to any extent the Revenue Department's contention was that under the law they were foreign to the product. Judge Brown took this into consideration in his decision in the case of Higgins vs. Page, 297 Fed. 644, at the bottom of page 647, where he quotes from the argument of the Solicitor General in the case of Moxley vs. Hertz, 216 U. S. 344, as follows:

"The true distinction between natural and artificial colorants is unconnected with the statutory enumeration and must be discovered in the real nature of oleomargarine itself as universally recognized and not altered by statute, or in the natural relation of the colorant to the end (butter color) sought to be accomplished. By this test, oleomargarine is an article manufactured from animal fats; and a vegetable oil is a foreign, and so artificial, addition to it just as much as if it were not named in the statute . . . . . The only ingredients which can be considered natural to oleomargarine are the animal (including butter) fats, and the only natural colorant is butter itself."

Judge Brown did not believe the law included other than animal ingredients. This is shown by his statement on page 650 of the opinion as follows:

"While I doubt whether the statute should be given a construction which includes compounds free from animal fats, a decision of this question seems unnecessary for the disposition of this case, for the reason that according to the preponderance of the evidence, the plaintiff's product, Nut-Z-All, is 'not made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter.' This was the opinion of the Commissioner as stated in the foregoing letter of January 20, 1922, and seems to me the better opinion."

We submit that the statute as passed, as signed by the presiding officer of each House, and the President, as filed in the archives of the Secretary of State, as published in the Statutes at Large, the Revised Statutes and every official revision for forty years should prevail against the effort of the Revenue Department to insert a mark on its own initiative. The very fact that Congress has through three sessions endeavored to pass a law in which these oils would be taxable should be at least persuasive on that point.

Extract of report of the Committee on Agriculture submitted to Congress on May 11, 1928, in this regard states:

"In line 18 of the printed bill a comma has been added between the term 'Vegetable oil' and the word 'annatto.' This is to correct a situation which arose because in the engrossed copy of the act of 1886 as amended this comma was omitted.

Neither the original engrossed bill, the original print, and the engrossed law as signed by the presiding officer of each house and the President of the United States contains this comma, and the comma is found nowhere except in the prints made by the Revenue Department. That Department endeavored to amend the law by arbitrarily inserting this comma and thereby making taxable a large group of food products unknown at the time of the passage of the law. There would be as much reason for the Department to insert a comma between the word "peanut" and "butter" in the recent tariff law imposing a duty on imported "peanut butter," and by so doing put a duty on both "peanuts" and "butter."

When a law is passed, certified, signed, and filed, it must, as to form be conclusive. As authority for this we refer the court to its opinion in the case of **Clark vs. Field, 143 U. S. 649,** where the matter is fully reviewed and the rule which has ever since governed, set out, after which the court says:

"We are of opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either House, from the reports of committees or from other documents printed by authority of Congress, that the enrolled bill, designated 'H. R. 9416,' as finally passed, contained a section that does not appear in the enrolled Act in the custody of the State Department."

"An enrolled bill on file in the office of the Secretary of State must be accepted without question by the courts as having been regularly enacted by the Legislature."

State vs. Jones, 6 Wash. 452, 23 L. R. A. 340, in note gives rules of various states and England.

The field case has been approved many times by this Court. In Harwood vs. Wentworth, 162 U. S. at p. 558.

Again in 1901 in the case of Chesapeake & Potomac, etc., vs. Manning, 186 U. S. at p. 245, it is said:

> "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable."

There is a very grave doubt that Congress ever intended to tax any ingredient other than animal fats and oils.

We wish to remind the Court of a principle of law which has, because of its constant reiteration, becomes a legal axiom. It is that being a revenue law, it must be construed most favorably in behalf of the taxpayer. This is precisely set out in U. S. vs. Merriam, 263 U. S. 186, at p. 188, as follows:

> "But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 62 L. Ed. 211, 213, 38 Sup. Ct. Rep. 53."

In Hartranft v. Wiegmann, 121 U. S. 609, at 616, this Court said:

> "We are of opinion that the decision of the circuit court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the im-

porter 'as duties are never imposed on the citizen upon vague or doubtful interpretations.' Powers v. Barney, 5. Blatchf, 202; U. S. v. Isham, 84 U. S., 17 Wall. 496 (21: 728, 730); Gurr v. Scudds, 11 Exch. 190; 191; Adams v. Bancroft, 3 Sumn. 384."

To correctly interpret the statute it is necessary to ascertain conditions and conceptions at the time the statute was passed. This is especially true in this case which limits the definition to certain "substances" that were "heretofore" known by certain names. The case of **Brawn and Fitts vs. Coyne, 125 Fed. 331,** by the Circuit Court, Northern District of Illinois, decided January 30, 1899, in passing upon this statute stated:

> "Oleomargarine is usually made of leaf lard, and beef fat churned in milk and cream, or milk, cream and butter, to give it flavor, and colored **with vegetable dye annatto** * * * The tax practically is upon the product of such manufacturers of leaf lard, beef fat, etc., as are made in the conscious imitation of butter. The purpose of Congress was to protect butter, as it has commonly been known against outside competitors, under the guise or appearance of butter. The test is this: Is the product a conscious imitation of butter? In my opinion, it is not taxable under the Oleomargarine Law. The fact that it is put up in one pound packages does not make it a conscious imitation of butter. The manufacturers of butter have no monopoly upon the commercial expedient of one pound packages."

In the case of Com. vs. Van Dyke, 9 Penna. Dist. 41, decided Jan. 17, 1900, the court in describing oleomargarine said:

> "A substance resembling it (butter) is now obtained from the fat of domestic animals and is called oleomargarine, a new word coined for the purpose."

This description is made just preceding the quotation of oleomargarine as set out in the Act of Aug. 2, 1886, Sec. 2.

In **State vs. Packing Co., 124 Iowa at 328,** the court in June, 1904, said:

"Remembering that oleomargarine is a manufactured product made of oleo oil, neutral, lard, milk and cream, and pure butter, although pure butter is not used in all grades and that butter and milk and cream or other coloring matter is evidently used for the purpose of giving it the semblance of butter, etc."

(2) THE TREASURY DEPARTMENT AND CONGRESS BOTH ADMIT THAT THE LAW DOES NOT TAX RESPONDENT'S PRODUCT.

On July 10, 1930, the President signed a law inserting a comma between the words "vegetable-oil" and "annatto" and including fish oil and fat and all products containing more than 1% moisture. This law as shown by Committee reports and statements of its sponsors was particularly designed to make taxable such products as Southern Nut Product. Congress delayed the taking effect of said law until July 10, 1931, solely for the protection of Respondent and others engaged in similar business. The Revenue Department however refuse to recognize this law and allow respondent, to continue its business until the effective date of such act, but persisted in prematurely closing such business by asserting the tax prior to the date allowed by Congress.

The author of the bill, Mr. Haugen, Cong. Rec. Feb. 1, 1930, H. R. p. 2996, in presenting the bill to the House of Representatives said:

"The purpose of the bill is simply to bring under the definition of oleomargarine a new arrival, another substitute for butter and oleomargarine. The aim of the proposed bill can be readily understood; it is so plain that he who runs may read. What is it! It is simply to do away with the practice of permitting the manufacture and sale of a certain product, as has been stated, composed of ingredients produced outside the continental limits of the United States. Briefly speaking, the purpose of the proposed bill is simple and readily understood. Its purposes is to do away with an unjust practice, and to permit the manufacture and sale of one product, the

so-called cooking compounds, scot free of tax and regulation, over another taxed product subject to Federal sanitary regulations and to remove the discrimination in favor of one product composed of ingredients produced outside of the continental limits of the United States, as against products composed of ingredients produced within the United States. In other words, to do away with an apparent rank injustice to worthy and legitimate domestic industry, the cotton seed industry and the dairy industry of our country.

"Recently a new substitute for butter and oleomargarine has been placed upon the market in the United States—sold in large quantities throughout the country—disguised and sold under numerous and various names, and generally referred to as cooking compounds, made largely from coconut oil, imported from outside the continental limits of the United States, mixed with a small portion of peanut oil, salted, and colored, sold in pound, half-pound, and quarter-pound packages of the same size and appearance as butter and oleomargarine. The so called cooking compounds are largely made of the same materials as oleomargarine, except that they are mixed and emulsified in water instead of in milk or cream.

In the report of the Committee on Agriculture on this bill, it is said:

"This bill repeats and reenacts into law, section 2 of the act approved August 2, 1886, as amended, which act defines butter and oleomargarine and provides for taxation of adulterated butter and oleomargarine and the conditions under which these products may be made and sold, with a number of changes for the purpose of making this statute fit conditions in the butter and oleomargarine industry brought about by the discovery of new processes and materials, and by changes in methods of manufacturing. * * * * .

The purposes of the amendment, in addition to clarifying the language of the act and including the fish oils and fats, as above briefly mentioned, is to bring a third class of fat compounds, in addition to the two specifically

enumerated in the existing law, within the definition of oleomargarine, and therefore within the taxing and regulating power of the Bureau of Internal Revenue. * * * *

These so-called cooking compounds, made in this manner, are not clearly within the definition of oleomargarine as it is stated in the present law, and as this law is interpreted by the courts. * * *

The evidence before the committee shows that the definition of oleomargarine in the present law is not sufficiently comprehensive to cover the fat and oil compounds that can and are being made to be so nearly like oleomargarine as to mislead the buying public. This is the purpose of the existing law. * * * *

Your committee realized that the distinguishing purpose of the oleomargarine law was to prevent the sale of adultered butter as real butter, and of oleomargarine as butter; that is, the protection of the public from fraud and misrepresentation. * * *

We believe that the primary purpose of the act of August, 1886, namely, to protect the public from fraud and substitution of an inferior product in place of butter is being defeated by the manufacture and sale of these so-called cooking compounds without license, restriction, or regulation. The public is entitled to protection from fraud and substitution of an inferior product for oleomargarine as well as of such product for butter."

The sponsor of the bill in the House, Mr. Purnell, in his request that the bill be passed, said (H. R. Jan. 31, 1930, p. 2907, 8):

"Mr. Speaker, ladies and gentlemen of the House, the resolution which I bring here by direction of the Committee on Rules, House Resolution 133, if adopted, will make in order H. R. 6, which is known to the membership of the House as the oleomargarine bill. The purpose of the bill, broadly stated, is to bring within the purview of the oleomargarine law certain cooking compounds which

have been manufactured and developed within the last few years and which are not now under the regulations of the oleomargarine act. * * *

The oleomargarine act, which this bill will amend, was passed in 1886. The purpose of the original oleomargarine act was to protect the public against adulterated butter and against the sale of oleomargarine as butter. * * *

Since the passage of the oleomargarine act there has come into existence in the country a new butter substitute branded as a cooking compound, but which to all intents and purposes is intended to be and is sold as butter. These new cooking compounds, which we seek to bring within the purview of the oleomargarine law and under its provisions, are made principally of coconut oil, perhaps 80 per cent coconut oil, and the balance peanut oil, salt, and water. They are made in the identical manner as oleomargarine with this exception: Oleomargarine is emulsified in milk or cream, whereas these cooking compounds are emulsified in water. The ordinary cooking compounds which are known to the housewives of the country generally, such as lard, Crisco, and so forth, have about 1 per cent or less of moisture, while these cooking compounds have from 10 to 15 per cent of moisture. * * * * Let me remind the ladies and gentlemen of the House that the manufacturers of these cooking compounds are under no restriction whatever. They pay no tax. The Government has no supervision over the manufacture of their product and imposes no obligations upon them."

Senator Norbeck, who sponsored the law in the Senate said (Senate Record May 22, 1930, p. 9731):

"This measure is intended to deal with a situation which has developed quite recently—that is, there have been so many forms of butter substitutes coming on the market that their sale amounts to what is almost a fraudulent practice. The bill does not propose to change the present law as to oleomargarine, the main features of which were adopted more than 40 years. * * * A large

business has developed in these substitutes, which differ just enough from oleomargarine to escape the requirements of the law, and thereby avoid the tax."

The Commissioner of Internal Revenue **himself** recognized that these substances are not taxable and in a letter to Senator Norbeck, May 26, 1930, (Senate Record 26, 1930, p. 9930) said:

> "Bill H. R. 6 was drafted to bring these so-called cooking compounds within the definition of oleomargarine as provided in the act of August 2, 1886, as amended by the act of May 9, 1902, and thus avoid the multiplicity of law suits and conflicting court decisions with which the Government was threatened in every attempt made to hold such products subject to the oleomargarine law."

On January 10th, 1930 Commissioner of Internal Revenue Lucas wrote a letter to Congress (Cong. Rec. Feb. 1, 1930, p. 2999) recommending the passage of a law covering these products saying:

> "In view of the injunction granted the Higgins Manufacturing Company of Providence, R. I., by the District Court of Rhode Island, enjoining the collector from collecting tax on their product manufactured from vegetable oils, salt, water and artificial coloring, no attempt has been made to assess stamp tax on Higgins Nut Product or to require the payment of special tax by dealers selling the same.
>
> "The Standard Nut Margarine Co., of Jacksonville, Fla., was recently granted a temporary injunction by the United States District Court at Jacksonville, Fla., restraining the collector of internal revenue for this district from the collection of stamp tax upon the manufacture of the plaintiff's Southern Nut Product and from special tax upon its sale at wholesale and re[illegible]. It is understood that this case has been set for trial under date of February 24, 1930.
>
> "In al[illegible]bability numerous other injunction proceedings [illegible]e instituted restraining the collection

"Why pass this act, if it was previously the law? This question was asked by Mr. Justice Strong, in Bath County v. Amy, 13 Wall. 249, 20 L. ed. 539, in discussing the eleventh and fourteenth sections of the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 78, 81), where it was insisted the power to issue certain writs was given by Section 11, and wherein by said Section 14 that power was expressly granted, and he inquires:

> 'Why make this grant if it had been previously made in the eleventh section?'

"Had the Attorney General been authorized to appoint and commission special assistants to the district attorneys, with authority to conduct proceedings before the grand juries of the country, the Act of June 30, 1906, would not have been passed. There would have been no need for it. It seems needless to add that, if the contention of counsel for the government as to the law prior to the passage of the Act of June 30, 1906, is correct, that act would be but declaratory thereof, and it would in no way affect it, The Court, however, does not agree with counsel for the government in the contention that the act of June 30th was the law prior to that date. It follows therefore that the Court is of the opinion that the Attorney General of the United States was not authorized by law to confer upon the special assistants to the district attorney the right to conduct investigations before the grand jury, as was done in this case, and that Messrs. Sanford and Graves were improperly before the grand jury under the facts stated herein above."

In Fairbanks v. U. S., 181 U. S., at p. 308,, it is said:

> "If there were doubt in reference thereto the practical construction placed by Congress of the statute was sufficient to remove the doubt."

In Welch v. Cook, 97 U. S. 541, it is said:

> "We are to presume that Congress knew that as the law stood on the 20th. of June, 1874, the property in the district was liable to taxation with certain exceptions, and that it knew of what the exceptions consisted. We are

also to presume that it appreciated the effect of its action when it took upon itself anew the duty of fixing the subjects of taxation."

In U. S. v. Gilmore, 8 Wall, 330, it is said:

"A construction by the Legislature is entitled to greater weight than one by the Executive."

With respect to this point, the court below said (R. 82, 3):

"The product which was the subject of that threatened exaction, a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter, was not in existence until long after the enactment of the oleomargarine act. It was not made in imitation or semblance of butter, and was not a mixture or compound described in section 2 of that act (26 U. S. C. A. Paragraph 541), which covered no mixture or compound containing any vegetable ingredient other than 'vegetable oil annatto,' which is a dyeing or coloring material used for coloring butter, cheese, etc. Nothing in that statute indicated an intention to tax such a mixture or compound as plaintiff's Southern Nut Product, or that the lawmakers, in enacting that statute, contemplated the possibility of such a mixture or compound being devised and coming into competition with butter."

"We think it would be a manifest perversion of the statute in question to permit it to be made the means of enabling a tax official to obtain exemption from being restrained from enforcing an exaction which no legislation purports to provide for."

VII.—CONCLUSION

We therefore submit that there exists in this case such exceptional and extraordinary circumstances as to create an exception to Sec. 3224 R. S. and that the District Court committed no error when it granted the injunction and that the Circuit Court of Appeals properly sustained the decision of the lower court.

Respectfully submitted,

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